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13 **UNITED STATES DISTRICT COURT**
14 **CENTRAL DISTRICT OF CALIFORNIA**

15 ROBIN BAIN, an Individual,

16 Plaintiff,

17 v.

18 FILM INDEPENDENT, INC., a
19 California Corporation, doing business
as the “LA Film Festival”; LA MEDIA
WORKS, CORP. a business entity of
unknown form; JESSICA HAID a.k.a.
“Jessica Cesaro”, an Individual; and
DOES 1-10,

20 Defendants.

21 JESSICA CESARO professionally
22 known as “JESSICA HAID,” an
Individual,

23 Counter-Claimant,

24 v.

25 ROBIN BAIN, an Individual; and DOES
26 11-20,

27 Counterclaim-Defendants.

28 Case No.: 2:18-cv-04126-PA(JEMx)

11 **DEFENDANT / COUNTER-
12 CLAIMANT JESSICA HAID’S
13 MOTION FOR SUMMARY
14 JUDGMENT AND/OR
15 ADJUDICATION**

16 DATE: August 10, 2020
17 TIME: 1:30 p.m.
18 JUDGE: Percy Anderson
19 COURTROOM: 9A

20 COMPLAINT FILED:

21 May 16, 2018

22 FINAL PRETRIAL CONFERENCE:

23 October 8, 2020

24 TRIAL DATE:
25 October 13, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

Defendant Jessica Cesaro, professionally known as Jessica Haid (“Haid”), by and through her counsel, hereby submits this Memorandum of Points and Authorities in support of her Motion for Summary Judgment and/or Adjudication.

I. INTRODUCTION

This case is about a former Playboy model turned film writer/director/producer, Robin Bain (“Bain”), who in the process of making movies that shed light on the victimization of women, has herself victimized her lead actress, Haid, culminating in filing this copyright lawsuit against Haid for simply commissioning the creation of an acting reel. Bain took advantage of a poor girl who was new to Hollywood and film making, and caused her to endure questionable safety practices on set, for pay that was below minimum wage, all while beguiling her with the prospect of an illustrious acting reel that all budding actors try so desperately to build when they are first starting their careers.

Through a series of false promises, Bain takes advantage of Haid's naivete and subjects her to extreme working conditions for little pay. Ultimately, *Bain* gets to make the movie *Bain*'s way. The film immediately garners wide festival success in the United States. Unfortunately for Haid, despite being the lead of the film, Haid never capitalizes on the film's success because Bain never followed through with her promise to provide Haid with footage for a reel.

Once a copy of the film found its way into Haid's hands, she immediately hired a reel editor to help her create an acting reel so that she could finally seek more work. As one would expect, it is industry custom and practice for actresses to use footage of their prior work in their acting reels. Even Bain does it. In this instance, however, there can only be one star of the show. When Bain learns about the reel, Bain immediately demands Haid to destroy it before Haid ever puts it to

1 use. Yet, even after Haid destroys all copies of the reel in her possession, Bain
2 wanted to teach Haid a lesson – this is *Bain*’s movie and *she*’s the star.
3

4 **II. STATEMENT OF FACTS**

5 ***Haid’s Employment by Bain for Nowhereland***

6 Haid was employed by Plaintiff Robin Bain (“Bain”) in 2014 and cast as the
7 lead character, “Shara,” in the motion picture *Girl Lost*, also known as *Nowhereland*
8 (“Film”). Statement of Uncontroverted Facts (“SUF”) ¶ 1. Haid first commenced
9 work for Bain in 2014 for the purpose of creating a “sizzle reel” to raise financing
10 for the production of the Film, and was thereafter employed for production by Bain
11 and her production company, Nowhereland Movie LLC. *Id.* ¶ 2. After several
12 months for pre-production, principal photography for the Film commenced on or
13 about November 3, 2014, and Haid continued to work for Bain through principal
14 photography, post-production, and during the festival circuit. *Id.* ¶ 3. During
15 production, Bain made promises that Haid would be able to use footage from the
16 Film in her acting reel (i.e. a collection of scenes designed to show an actor’s range
17 of emotions, versatility, and level of acting prowess). *Id.* ¶ 4. A finished version of
18 the Film was completed on or about late-2015 / early-2016. *Id.* ¶ 5.

19 The Film was commercially exhibited at numerous film festivals throughout
20 the United States. *Id.* ¶ 6. In 2016 alone, the Film was exhibited at no less than the
21 following festivals:

- 22 • May 26, 2016 at the IFS Film Festival in Los Angeles, California;
- 23 • October 21, 2016 at the LA Femme Film Festival in Beverly Hills,
24 California;
- 25 • October 25, 2016 at the Twin Cities Film Festival in Minneapolis,
26 Minnesota;
- 27 • November 6, 2016 at the ARPA International Film Festival in
28 Hollywood, California;

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1 • November 23, 2016 at the Newfilmmakers New York in New York
2 City, New York.

3 *Id.*

4 The Film continued to garner critical acclaim, garnering numerous awards
5 from the various festivals in 2016 and 2017. *Id.* ¶ 7. In May of 2018, the Film
6 became available for streaming to the public, and quickly became the “#1 Trending
7 Movie on AMAZON PRIME VIDEO in June 2018,” the “#1 Most Popular Movie
8 on TubiTV.com in June & July 2018,” the “Top 5 Trending Movie on Apple TV in
9 June 2018,” and “Over 2.7 MILLION VIEWS of the Official Girl Lost Trailer on
10 YouTube,” and “Project of the day on IndieWire.” *Id.* ¶ 8. As a result of the Film’s
11 success, Bain commenced production for a sequel to the Film, which is a
12 continuation of the same theme. *Id.* ¶ 9. Promotional artwork for the sequel, *Girl*
13 *Lost 2: A Hollywood Story*, reads as follows:

14 “80% of runaway & homeless girls report having been involved in
15 prostitution”¹

16 *Id.*

17
18 ***Creation of Haid’s Acting Reel***

19 As the Film continued to receive festival success, Haid requested that Bain
20 provide her with footage from some of the scenes in the Film so that Haid could
21 create an acting reel in order to obtain more work as an actress. *Id.* ¶ 10. Bain
22 declined to provide footage so that a reel could be created, despite previously
23 promising to Haid during principal photograph that footage from the Film would be
24 made available to her for her acting reel. *Id.* ¶ 11.

25
26
27 ¹ The marketing image for *Girl Lost 2: A Hollywood Story* is publicly available on
28 the website <https://www.girllostmovie.com/>. SUF ¶ 70.

1 In early 2017, Haid received a digital copy of the Film from another
2 individual. *Id.* ¶ 12. Haid has no knowledge of how the individual obtained a digital
3 copy of the Film or how the individual may have had access to a copy. *Id.* ¶ 13. The
4 copy that Haid received contained copyright management information (“CMI”). *Id.*
5 ¶ 14. The words “Property of LesLin Films 2016” were present at the bottom of the
6 screen. *Id.*

7 In early 2017, Haid contacted Marc D’Amour (“D’Amour”) of LA Media
8 Works, Corp. (“LA Media”) to commission the creation of an acting reel (“Reel”).
9 *Id.* ¶ 15. As source material, Haid provided D’Amour with the digital copy of the
10 Film that was in her possession, along with additional source material that was in
11 her possession. *Id.* ¶ 16.

12 Using the source material that was provided by Haid, D’Amour created his
13 first pass of the Reel. *Id.* ¶ 17. As part of D’Amour’s routine process, D’Amour
14 removed the CMI while preparing the Reel so that it does not distract prospective
15 viewers. *Id.* ¶ 18. Haid never instructed D’Amour to do so. *Id.* ¶ 19. The only
16 footage that D’Amour chose to use for the Reel was footage from the Film, even
17 though Haid provided D’Amour with other sources. *Id.* ¶ 20. The other footage was
18 not used because they consisted of low production quality videos. *Id.* ¶ 21.
19 D’Amour and his assistant identified all of the scenes that would be used in creating
20 the Reel without Haid’s input as to what scenes should be included in the Reel. *Id.*
21 ¶ 22. D’Amour alone chose the start and end point for each of the clips, using his
22 own software, on his own computer. *Id.* ¶ 23.

23 On February 27, 2017, D’Amour uploaded the first pass of the Reel to his
24 account on Vimeo.com, which then allowed him to post the video onto a page on
25 LA Media’s Wordpress website. *Id.* ¶ 24. By uploading the video in this manner,
26 Haid was able to view D’Amour’s first pass of the Reel through her web browser
27 without having to download a copy of the video to her computer. *Id.* ¶ 25. D’Amour
28 delivered an email to Haid on February 28, 2017 which contained the url link

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1 <http://lamediaworks.com/jessica-taylor-haid/>, in order for Haid to view D'Amour's
2 first pass of the Reel. *Id.* ¶ 26. Although D'Amour only intended to share the Reel
3 with Haid, neither D'Amour nor Haid were aware at the time that the url was
4 publicly available or searchable on the Google search engine. *Id.* ¶ 27.

5 On March 8, 2017, Haid asked D'Amour to make minor changes by adding
6 and removing some scenes that were in the Film, without specifying how much of
7 any particular scene to add. *Id.* ¶ 28. On March 21, 2017, D'Amour sent another
8 pass of the Reel to Haid, using the same url. *Id.* ¶ 29. Haid responded the same day,
9 asking D'Amour to add "a little more from the bedroom scene," and "take out the
10 kiss at 1:10 and full body shot at 2:05." *Id.* ¶ 30. On March 23, 2017, D'Amour
11 created what would become the final draft of the Reel, again using the same url to
12 make the Reel available to Haid. *Id.* ¶ 31. Haid responded on March 31, 2017,
13 thanking him for his hard work and stating "It's perfect. I'm so happy!" *Id.* ¶ 32.
14 D'Amour sent an invoice to Haid in the amount of \$405, which was then paid on
15 May 10, 2017. *Id.* ¶ 33. Haid had no affiliation with LA Media thereafter. *Id.* ¶ 34.
16

17 ***Legal Action from Bain***

18 Even though Haid commissioned D'Amour to create the Reel in hopes to find
19 more work as an actress, Haid never utilized the Reel and did not earn a single dollar
20 from the creation or distribution of her Reel. *Id.* ¶ 35. Haid never obtained a role as
21 an actress through the use of her Reel. *Id.* Haid did not share the Reel with any film
22 producers or casting agents. *Id.* Haid never sold her Reel for profit, nor did she make
23 the Reel available for public consumption. *Id.*

24 Bain discovered the Reel on LA Media's website on or about August 10,
25 2017. *Id.* ¶ 36. Bain then contacted LA Media and requested that the Reel be taken
26 down. *Id.* ¶ 37. The Reel was removed from LA Media's website on or about August
27 10, 2017. *Id.* Counsel for Bain then delivered a cease and desist letter to Haid via
28 email on August 23, 2017, instructing Haid to destroy all copies of the Film and the

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1 Reel that were in her possession. *Id.* ¶ 38. Shortly thereafter, Haid fully complied
2 and destroyed all copies of the Film and the Reel, as well as any correspondence
3 between her and D'Amour, in regard to her good faith understanding of what was
4 required of her to comply with the cease and desist letter from Bain's counsel. *Id.* ¶
5 39. On August 31, 2017, Haid responded to Bain's counsel via email, stating in part,
6 "Here you have in writing that I Jessica do not posses [sic] any copies of
7 Nowhereland." *Id.* ¶ 40.

8 On January 16, 2018, Bain's new counsel sent a follow up demand letter to
9 Haid, five months after Haid previously confirmed that she had destroyed all copies
10 of the Film and the Reel. *Id.* ¶ 41. By May of 2018, Bain filed this instant lawsuit
11 against Haid for: (1) Copyright Infringement; (2) Vicarious and/or Contributory
12 Copyright Infringement; (3) violation of the Digital Millennium Copyright Act (17
13 U.S.C. § 1202); and (4) Conversion.² Dkt. 1 Complaint. This lawsuit garnered
14 immediate press attention in *The Hollywood Reporter*. *Id.* ¶ 44. Although the Reel
15 was inadvertently made public by LA Media, throughout the duration of this
16 lawsuit, Bain has been unable to produce a single piece of evidence which would
17 demonstrate that the Reel had any real or potential effect on the market for the Film.
18 *Id.* ¶ 45. As of August 31, 2017, Haid's Reel had a total view count of three views
19 on Vimeo.com. *Id.* ¶ 46.

20
21 ***Comparison of the Film to the Two Reels***

22 The Film has a total run-time of 95 minutes. *Id.* ¶ 47. The copyright for the
23 Film was registered by Bain with an effective date of August 11, 2017, five months
24 after the Reel was created. *Id.* ¶ 48. The Film was made publicly available on
25
26

27 _____
28 ² Bain's claim for conversion was dismissed with prejudice on a Motion to
Dismiss. Dkt. 25 Minute Order.

1 Amazon Prime in or about May of 2018. *Id.* ¶ 49. The description on Amazon Prime
2 reads as follows:

3
4 Growing up in the seedy, underbelly of Los Angeles, Shara knows no
5 other life. After a dramatic encounter with her mom's abusive ex-
6 boyfriend, Shara finds herself homeless and alone on the streets of
7 Hollywood. Struggling to survive, the wayward teen turns to the only
8 option she believes she has, selling her body and her soul.

9 *Id.* ¶ 50.

10 As is common in American film, the story of the Film is built on a structure
11 composed of three acts, which tells the story of Shara and her life as a prostitute at
12 a young age, and the characters that shape her experience with sex-trafficking. *Id.*
13 ¶ 51.

14 The Reel, in contrast, does very little to tell the actual story of the Film, if at
15 all. *Id.* ¶ 52. The Reel consists entirely of clips that demonstrate Haid's range of
16 emotion, versatility, and level of acting prowess as an actress. *Id.* ¶ 53. One hundred
17 percent of the Reel depicts Haid in the role of Shara since the Film is the only source
18 that was actually used by D'Amour to create the Reel. *Id.* ¶ 54.

19 The version of the Reel that was made viewable to Haid on February 28, 2017
20 has a run time of 2 minutes and 50 seconds. *Id.* ¶ 55. The Reel, as is customary,
21 focused entirely on Haid, and only depicts six other characters from the Film, none
22 of which appear in the Reel for more than 19 seconds out of 2 minutes and 50
23 seconds. *Id.* ¶ 56. Other characters from the Film who play critical roles in the
24 storyline never appear in the Reel. *Id.* ¶ 57. The clips do not portray any of the main
25 plot points or story arcs that were present in the Film. *Id.* ¶ 58. This version consists
26 of 40 different segments, or clips, from the Film, which average about 2.8 seconds
27 in length for each clip. *Id.* ¶ 59. The various clips were arranged out of sequence in
28

1 comparison to the scenes as they appear in the Film. *Id.* ¶ 60. The clips were also
2 synchronized to music that was otherwise not present in the Film itself. *Id.* ¶ 61.

3 The version of the Reel that was made viewable to Haid on March 23, 2017
4 has a run time of 3 minutes and 39 seconds. *Id.* ¶ 62. This version is very similar to
5 the prior version, and again depicts the same six characters from the Film and no
6 one else, with the primary focus on Haid's character for the entirety of the Reel. *Id.*
7 ¶ 63. The clips again did not portray any of the main plot points or story arcs that
8 were present in the Film. *Id.* ¶ 64. This version again consists of 40 different clips
9 from the Film, which average about 3.6 seconds in length for each clip. *Id.* ¶ 65.
10 While there is a motel scene that exceeds 1 minute in length, this particular clip
11 eliminates most of the dialogue of the character playing opposite of Haid, and
12 focuses solely on the expressiveness of Haid's emotions to demonstrate her ability
13 to carry such an emotional scene, in keeping with the purpose of an acting reel. *Id.*
14 ¶ 66. The clips in this version are again out of sequence in comparison to the scenes
15 as they appear in the Film, and synchronized to the same music as the prior version
16 which did not originate from the Film. *Id.* ¶ 67.

17

18 **III. LEGAL STANDARD**

19 Summary judgment is proper “if the pleadings, depositions, answers to
20 interrogatories, and admissions on file, together with the affidavits, if any, show
21 that there is no genuine issue as to any material fact and that the moving party is
22 entitled to a judgment as a matter of law.” *Celotex Corp. v. Catrett*, 477 U.S. 317,
23 322–23 (1986); Fed. R. Civ. Proc. Rule 56(c). Entry of summary judgment is
24 mandated when a party is unable to make a showing sufficient to establish the
25 existence of an element essential to that party's case, and on which that party will
26 bear the burden of proof at trial. *Celotex*, 477 U.S. at 322–23. There can be “no
27 genuine issue as to any material fact,” since a complete failure to prove an essential
28 element of the nonmoving party's case renders all other facts immaterial. *Id.* In such

1 instance, the moving party is “entitled to a judgment as a matter of law” because
2 the nonmoving party fails to make a sufficient showing on an essential element of
3 her case with respect to which she has the burden of proof. *Id.*

4

5 **IV. ARGUMENT**

6 **a. Haid’s Commissioning of an Acting Reel is Protected by Fair Use**

7 Bain’s claims for Copyright Infringement, Vicarious and/or Contributory
8 Copyright Infringement, and Violation of the Digital Millennium Copyright Act (17
9 U.S.C. § 1202) must fail because the allegedly infringing works are protected by
10 fair use.

11 The doctrine of fair use creates a limited privilege in those other than the
12 owner of a copyright to use the copyrighted material in a reasonable manner without
13 the owner's consent. *Fisher v. Dees*, 794 F.2d 432, 435 (9th Cir. 1986) (citing
14 *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539 (1985)). Fair
15 use is regarded as an equitable defense to copyright infringement. *Fisher*, 794 F.2d
16 at 435. The doctrine of fair use is codified in 17 U.S.C. §107, which states that if a
17 secondary user of a copyrighted work is fair then the secondary user may bypass
18 the exclusive rights of the owner. However, Congress expressly sought to preserve
19 the doctrine's common law character, leaving courts “free to adapt the doctrine to
20 particular situations on a case-by-case basis.” *Campbell v. Acuff-Rose Music, Inc.*,
21 510 U.S. 569, 577 (1994), citing 17 U.S.C. § 107; *Fisher*, 794 F.2d at 435. “In
22 determining whether the use made of a work in any particular case is a fair use the
23 factors to be considered shall include—

24

25 (1) the purpose and character of the use, including whether such use is
26 of a commercial nature or is for nonprofit educational purposes;
27 (2) the nature of the copyrighted work;

- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
- (4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.” *Campbell*, 510 U.S. at 576–77, citing 17 U.S.C. § 107.

i. Purpose and Character of the Use

The first factor in a fair use inquiry is “the purpose and character of the use.” 17 U.S.C. § 107(1); *Campbell*, 510 U.S. at 578–79. The central purpose of this investigation is to see whether the new work merely “supersede[s] the objects” of the original creation, or instead adds something new, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is “transformative.” 510 U.S. at 579. Transformative works “lie at the heart of the fair use doctrine’s guarantee of breathing space within the confines of copyright . . . and the more transformative the new work, the less will be the significance of other factors . . . that may weigh against a finding of fair use.” *Id.* at 579.

The sole purpose of the Reel, and any acting reel for that matter, is to provide prospective employers with a sense of the actress's level of acting talent before the employer decide to audition or cast the actress in future acting roles. The Reel can best be understood as Haid's acting resume. The Reel is supposed to convey the range of emotion that Haid is able to demonstrate as an actress. Regardless of whether the Reel consists of footage from one source, or many sources, the ultimate purpose is not to capture a wide variety of work, but rather a wide variety of expression and emotion to convey the range of Haid's talent. For a particularly new actress, such as Haid, is it not unusual to pull all of the footage from the most

1 professionally produced source that she has available. This is because the quality
2 of the footage, whether fairly or unfairly, may have some effect on the viewer's
3 perception of Haid's abilities as an actress. If Haid only has one project that can
4 properly convey her acting ability, then pulling from alternative performances that
5 are subpar or low quality would only serve to make her Reel less dynamic, less
6 convincing, and less effective.

7 Furthermore, the Reel makes absolutely no attempt to tell the story of the
8 Film. The Reel does not tell the story of Shara's (Haid's character) involvement
9 with depression, sex-trafficking, drug abuse, sexual assault, poverty, or suicide.
10 This is because the underlying story of the scene is not pertinent to whether Haid is
11 qualified for a role in another film. When a prospective employer is reviewing
12 Haid's work, the employer is not trying to understand the storyline of the role that
13 she is presenting.

14 Thus, this Reel does not capture the story of the Film at all. In fact, it portrays
15 the scenes of the Film out of sequence, omits important plot points, and intentionally
16 does not include the entirety of the scenes that they were pulled from. For example,
17 in almost every clip that was used in the Reel, the dialogue for the character playing
18 opposite of Haid is omitted, except when necessary to provide context for what
19 Haid's character is saying in the scene. The Reel does portray some of the
20 characters that are central to the story (Kim, Jamie, Bridgette, Louie, Cap), but also
21 fails to include other characters that are significant to the story (Madame Yeva, the
22 customers that Shara meets along the way).

23 Because the purpose of the Reel is solely to provide a prospective employer
24 with a sense of Haid's acting ability, and serves absolutely no purpose of telling the
25 story of the underlying work from which the scenes are sourced from, the purpose
26 of the Reel is transformative in nature when compared to the purpose of the Film.
27 This factor therefore weighs in favor of a finding of fair use.

28
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1 *ii. Nature of the Copyrighted Work*

2 The second statutory factor, “the nature of the copyrighted work,” draws on
3 the expression, the “value of the materials used.” 17 U.S.C. § 107(2); *Campbell*,
4 510 U.S. at 586. Some works are closer to the core of intended copyright protection
5 than others, with the consequence that fair use is more difficult to establish when
6 the former works are copied. *Id.* This factor “turns on whether the work is
7 informational or creative.” *Worldwide Church of God v. Philadelphia Church of*
8 *God, Inc.*, 227 F.3d 1110, 1118 (9th Cir. 2000); see also *Harper & Row*, 471 U.S.
9 at 563 (“The law generally recognizes a greater need to disseminate factual works
10 than works of fiction or fantasy.”). The Ninth Circuit has recognized, however, that
11 this second factor “typically has not been terribly significant in the overall fair use
12 balancing.” *Dr. Seuss Enters., L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1394,
13 1402 (9th Cir. 1997).

14 Here, both the Film and the Reel are in audio-visual format. This is because
15 an acting reel is supposed to be a compilation of scenes that are taken from other
16 motion picture projects that the actor or actress has previously appeared in. An
17 acting reel would not serve its purpose properly if it were not in the same audio-
18 visual format as the work from which the footage has been sourced. Therefore, this
19 factor is of no help in “separating the fair use sheep from the infringing goats” when
20 trying to determine whether an acting reel infringes on the copyright of the original
21 motion picture that a scene is sourced from. See *Campbell*, 510 U.S. at 586.

22 While this factor is not that important, it should be noted that, while the
23 Film’s primary purpose is to convey a fictional story, the Reel’s primary purpose is
24 to convey *factual* information about Haid’s acting ability and the quality of her
25 performance.

26 *iii. Amount and Substantiality of the Portion Used*

27 The third factor asks whether “the amount and substantiality of the portion
28 used in relation to the copyrighted work as a whole,” or whether “the quantity and

1 value of the materials used” are reasonable in relation to the purpose of the copying.
2 17 U.S.C. § 107(3); *Campbell*, 510 U.S. at 586–87. The extent of permissible
3 copying varies with the purpose and character of the use. *Id.* The facts bearing on
4 this factor will also tend to address the fourth, by revealing the degree to which the
5 new work may serve as a market substitute for the original or potentially licensed
6 derivatives. *Id.* A taking may not be excused merely because it is insubstantial
7 with respect to the infringing work, for example, when the infringing work takes
8 what is essentially the “heart” of the original work. See *Harper & Row*, 471 U.S.
9 at 565.

10 The Supreme Court has recognized, however, that this factor necessarily
11 overlaps somewhat with the first factor—the “extent of permissible copying varies
12 with the purpose and character of the use.” *Campbell*, 510 U.S. at 586–87. See also
13 *Seltzer v. Green Day, Inc.*, 725 F.3d 1170, 1178 (9th Cir. 2013). This factor will not
14 weigh against an alleged infringer, even when he or she copies the whole work, if
15 he or she takes no more than is necessary for his or her intended use. See *Seltzer*,
16 725 F.3d at 1178 (Green Day’s transformative use of the *Scream Icon* image was
17 fair use, even though the image was used in its entirety); *Kelly v. Arriba Soft Corp.*,
18 336 F.3d 811, 820–21 (9th Cir. 2003) (“If the secondary user only copies as much
19 as is necessary for his or her intended use, then this factor will not weigh against
20 him or her.”). Thus, taking the “heart” of the original work is not dispositive when
21 the subsequent work is transformative in nature. See e.g. *Brown v. Netflix, Inc.*, No.
22 19 CIV. 1507 (ER), 2020 WL 2749571, at *5 (S.D.N.Y. May 27, 2020) (repeat and
23 substantial use of the song “*Fish Sticks N’ Tater Tots*,” which was written for
24 children, within in the context of a documentary about burlesque dancers, which
25 was targeted to adults, was found to be fair use).

26 Here, the Reel does not capture the essence or the “heart” of the underlying
27 Film. The Film is structured in three acts, which ultimately tells the story of Shara
28 (Haid’s character) and her experience in the world of sex-trafficking. Critical

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1 elements of the story include Shara's relationship with her mother Kim, her
2 boyfriend Jamie, and the many individuals that take advantage of her body along
3 the way (Cap, Louie, Madame Yeva, and others).

4 The Reel captures none of that. The Reel itself is not broken into Act I, Act
5 II, or Act III. The Reel omits most of the critical plot points that drive the story
6 from beginning to end. As previously stated, the purpose of each scene in the Reel
7 is to demonstrate Haid's ability to portray a range of emotion within each scene. In
8 the first version of the Reel, the average length of the scene is 2.8 seconds. In the
9 second version of the Reel, the average length of the scene is 3.6 seconds. It would
10 be virtually impossible to capture the "heart" of the Film by watching it out of order,
11 2 to 3 seconds at a time, with many of the central characters omitted. Even in the
12 motel scene which is 1 minute and 9 seconds in length in the second Reel, almost
13 the entire scene is focused on the character Shara with very little dialogue from the
14 character opposite of her. To the extent that any footage incorporated in the Reel
15 contains any critical moments of the Film, whether by revealing that Shara is a
16 prostitute, or Shara having a long emotional scene with her boyfriend in a motel
17 room, or capturing a glimpse of Shara in a bath tub before she cuts herself, the Reel
18 captures only the amount necessary to accomplish its transformative purpose, that
19 is, exhibiting the dynamic range of Haid's acting ability.

20 This factor weighs in favor of a finding of fair use.

21
22 *iv. Effect of the Use Upon the Potential Market*

23 The fourth fair use factor is "the effect of the use upon the potential market
24 for or value of the copyrighted work." 17 U.S.C. § 107(4); *Campbell*, 510 U.S. at
25 590. It requires courts to consider not only the extent of market harm caused by the
26 particular actions of the alleged infringer, but also "whether unrestricted and
27 widespread conduct of the sort engaged in by the defendant ... would result in a
28 substantially adverse impact on the potential market" for the original. *Id.* (citing

1 Nimmer § 13.05[A] [4], p. 13–102.61 (footnote omitted)); accord, *Harper & Row*,
2 471 U.S. at 569. The inquiry “must take account not only of harm to the original
3 but also of harm to the market for derivative works.” *Id.* at 568.

4 In this case, there is no evidence that the Reel had any effect on the market
5 for the Film. Haid did not earn a single dollar from the creation or distribution of
6 her Reel. Haid never obtained a role as an actress through the use of her Reel. Haid
7 did not share the Reel with any film producers or casting agents. Haid never sold
8 her Reel for profit, nor did she make the Reel available for public consumption.
9 The Reel garnered a total of **three** views on the Vimeo website, and the three views
10 do not translate to any revenue to Haid whatsoever.

11 As for any potential market effect, there is no potential market for Haid’s
12 Reel whatsoever. The sole purpose of the Reel is to present to potential employers
13 a range of Haid’s acting ability so that they may consider her for future acting roles.
14 The Reel itself is not intended for profit, nor is there an audience for people to
15 purchase Haid’s Reel, as charging for access to the Reel would impede Haid’s
16 ability to procure further work as an actress. Despite the fact that the Reel was
17 inadvertently available to the public on LA Media’s website, no evidence exists that
18 the Reel affected Bain’s ability to secure distribution. **The Film became an**
19 **immediate success in just one month after its wide release on several online**
20 **video platforms.** As a result of the Film’s success, Bain has even commenced
21 production on a subsequent film entitled *Girl Lost: A Hollywood Story*. The public
22 attention that this lawsuit received on *The Hollywood Reporter* arguably garnered
23 more attention than the Reel itself. Assuming *arguendo*, to the effect that the Reel
24 may have in any manner affected the potential market by way of any negative
25 publicity from the lawsuit, this kind market harm is solely the result of Bain’s
26 actions.

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1 Because the Reel has no effect on any real or potential market for the Film,
2 or any subsequent projects for Bain, this factor weighs heavily in favor of a finding
3 of fair use.

4

5 **b. Bain Cannot Prove The Necessary Elements of Her Claim for**
6 **Violation of the Digital Millennium Copyright Act (17 U.S.C. §**
7 **1202)**

8 Bain's claim for Violation of the Digital Millennium Copyright Act (17
9 U.S.C. § 1202) against Haid must fail because Bain cannot prove that Haid
10 possessed the requisite mental state under the law. Section 1202(b)(1) provides:

11 "No person shall, without the authority of the copyright owner or the
12 law ... intentionally remove or alter any copyright management
13 information ... **knowing, or ... having reasonable grounds to know**,
14 that it will induce, enable, facilitate, or conceal an infringement of any
[copyright]."

15 17 U.S.C. § 1202(b)(1). See *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 673 (9th Cir.
16 2018), cert. denied, 139 S. Ct. 1222 (2019). Section 1202(b)(3) provides:

17 "No person shall, without the authority of the copyright owner or the
18 law ... distribute, import for distribution, or publicly perform works,
19 copies of works, or phonorecords, knowing that copyright management
20 information has been removed or altered without authority of the
21 copyright owner or the law, **knowing, or ... having reasonable**
22 **grounds to know**, that it will induce, enable, facilitate, or conceal an
infringement of any [copyright]."

23 17 U.S.C. § 1202(b)(3); *Stevens*, 899 F.3d at 673. Both provisions therefore require
24 Haid to possess the mental state of knowing, or having a reasonable basis to know,
25 that her actions "will induce, enable, facilitate, or conceal" infringement of the Film.
26

27 *Id.*

i. Haid Did Not Remove any Copyright Management Information

2 It is undisputed that Haid played no role in removing any CMI from the Film.
3 Moreover, it goes against her interests to hide the fact that the footage in her Reel
4 was taken from a professionally produced motion picture for which she was paid.
5 The removal of CMI was performed as a routine process of LA Media in preparing
6 footage for the Reel. At no point did Haid instruct D'Amour to remove information
7 from the Film prior to incorporating scenes in the Reel.

ii. *Haid Had No Knowledge That the Removal of Copyright Management Information would “Induce, Enable, Facilitate, or Conceal” Infringement*

Even if, *arguendo*, Haid recognized that the watermark was going to be removed for the Reel, Haid is not liable for this claim unless she knew that the removal would “induce, enable, facilitate, or conceal” her ability to commit copyright infringement.

Haid had no intent of infringing on Bain's copyright. All she cared about was using the footage to create an acting reel because Bain promised years ago that Haid could do so. Within days of receiving the cease and desist from Bain's attorney, Haid complied with the demand and responded by saying "Here you have in writing that I Jessica do not posses [sic] any copies of Nowhereland." Clearly, Haid's intent was not set on committing copyright infringement.

iii. Haid's Hiring of LA Media to Create the Reel Does not Infringe on Bain's Rights Because Her Actions Pertaining to the Reel are Protected by Fair Use

As discussed above, Haid's hiring of LA Media to create the Reel does not infringe on Bain's copyright to the Film because the commissioning and creation of the Reel amounts to fair use. The Film's purpose is to tell a fictional story. The

1 Reel's purpose is to factually show in a visual manner Haid's acting prowess for
2 resume purposes. Haid's use of the footage is transformative in purpose, only uses
3 the amount that is necessary to display her level of proficiency as an actress, and
4 the use has absolutely no real or potential economic harm on the Film's market. If
5 the Court finds that the use itself is fair, then the ruling will be diametrically
6 opposed to a finding that Haid was "induc[ing], enabl[ing], facilitat[ing], or
7 conceal[ing]" infringement because fair use cannot *simultaneously* be an infringing
8 use. 17 U.S.C. § 107 ("fair use of a copyrighted work . . . is not an infringement of
9 copyright.").

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11

V. **CONCLUSION**

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As shown above, Haid's conduct with regards to the Reel are protected by fair use. Furthermore, Bain has not – and cannot – demonstrate that Haid possessed the requisite mental state under 17 U.S.C. § 1202 because Haid did not remove any of the CMI, Haid did not care whether any of the CMI was included within her Reel, and Haid's conduct cannot "induce, enable, facilitate, or conceal" infringement because the actions amount to fair use. Bain therefore, as a matter of law, cannot prevail on her claims for copyright infringement, vicarious and/or contributory copyright infringement, or violation of 17 U.S.C. § 1202.

Respectfully submitted.

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